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U.S. Citizenship
and Immigration
Services

Bb

[REDACTED]

FILE: EAC 01 187 53294 Office: VERMONT SERVICE CENTER Date: FEB 04 2004

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is the sole proprietor of an automobile repair firm. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), for one Fuentes, approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is January 31, 1996. The beneficiary's salary as stated on the labor certification is \$17.77 per hour or \$36,961.60 per year.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 9, 2001, the director exacted additional evidence to establish the petitioner's ability to pay the proffered wage from 1996, and continuing to the present. In response, on December 1, 2001, former counsel offered the petitioner's lease for business space and personal life insurance policy.

The director observed that the lease was an expense, and that the life insurance policy was a most peculiar way to meet a payroll. The director summarized the petitioner's federal tax returns, selected bank statements, and a business history as found in the Immigrant Petition for Alien Worker (I-140). In a decision issued May 7, 2002, the director determined that the petitioner did not establish the ability to pay the proffered wage at the priority date and continuing to the present, and denied the petition.

On the appeal, received April 10, 2002, substituted counsel (counsel) stated:

As a result of the changed circumstances of the petitioner and a proposed business plan, the beneficiary will be assuming 80% of the employment and development of the petitioner's business. The petitioner's representative because of advance age and health concerns will assume an oversight role only recieving [sic] 15 to 20% of the business income commensurate [sic] with the time. . . .

The Business Plan for S-P Auto Repair (SP business plan), dated April 3, 2002, identified the owner as SP, since 1993, of SP Auto, but it did not clarify the aforementioned "petitioner's representative." The SP business plan, offered on appeal, stated:

[SP] is a small but profitable Auto Repair Facility located at 1052 Ripley Street in Silver Spring Maryland. It has been in continuance [sic] operation since 1993. The business has been operated by one mechanic and owner, [SP]. [SP] has recognized over the last year that the growing customer base necessitates an additional mechanic. [SP], however, has decided that an integral part of the [SP business plan] requires that [SP] retire from a full time position at [SP] and... transfer the responsibility of the full-time position of mechanic to [the beneficiary].

The AAO considered that the appeal brief made ambiguous assumptions as to the petitioner's quotient of 15-20% of business income, as to identity of the "petitioner's representative" to receive it, and as to the average of three (3) "past," but undesignated, years' income. A fourth uncertainty was the basis of the claim of a five per cent (5%) increase of business on account of the beneficiary. Finally, no calculation supported the product of "\$37,125 and more" to pay the beneficiary as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO dismissed the appeal in a decision issued January 29, 2003. Counsel filed the instant motion to reopen (MTR) on February 28, 2003. The background for the MTR includes the petitioner's Form 1040, U.S. Individual Income Tax Returns, reporting adjusted gross income of \$33,635 for 1996, \$36,598 for 1997 and no tax return for 1998, each less than the proffered wage. Forms 1040 reflected adjusted gross income of \$39,866 for 1999 and \$43,516 for 2000, equal to, or greater than, the proffered wage. The petitioner selected three (3) bank statements from 1997 with average balances of \$622.91, \$1,258.52, and \$1,146.15, less than the proffered wage, and four (4) from 1998 of \$947.31, \$1,070.68, \$1,400.12, and \$1,261.25, less than the proffered wage. The MTR did not offer any federal tax return for 1998 or 2001.

The brief for the MTR contends that the petition should be approved, in that:

First, the [petitioner] clearly met his burden of proofs by clearly and convincingly demonstrating that the **petitioner's representative would be and has partially retired and that the intended beneficiary is the prime worker. Further, the decision refers to ambiguities in the appeal; THERE ARE NO AMBIGUITIES. Simply put, the majority of the work performed and capital and revenue of the petitioner has been and now is as a DIRECT RESULT if [sic] the employment and service of the beneficiary. The [AAO] decision speaks about prior materials being submitted which only serve to confuse the outcome. The present appeal [sic] and this motion ARE PREMISED [sic] ON THE FACT THAT ALL THE REVENUE IS FOR THE BENEFICIARY. FURTHER, THE PETITIONER HAS NOTIFIED ALL THE CUSTOMERS AND THE REFERRALS AND INCREMENT IN BUSINESS HAS BEEN AS A DIRECT RESULT OF THE WORK PERFORMED BY THE BENEFICIARY. (see attached letter and sales grid) We submit that there has been and now continues to be a clear demonstration of the ability to pay the proffered wage.**

This MTR contradicts itself and states, at once, that both the majority, and all, of the revenue of the business pertains to the beneficiary. The appeal ambiguously ascribed 15%-20% of the revenue to the petitioner and assumed a 5% increase in business.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Consistent with counsel's assertions that prior years' materials merely confuse the outcome, the MTR cites no federal tax returns or credible financial statements for 1996, 1997, 1998, or 2001 to support the petitioner's ability to pay the proffered wage. SP's affidavit, sworn to on April 3, 2002, states no amount of wages paid to the beneficiary for 2001, and the record reflects no claim of his employment by the petitioner before 2001. Counsel cites no authority for the proposition that these years' data are irrelevant to the decision.

On the contrary, the decision depends on the ability to pay the proffered wage from the priority date and continuing to the present. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The MTR presents a "sales grid" for March 2002 through January 2003, titled Income Increase Over The Months (2002 Schedule). The 2002 Schedule appears to be a statement, instead, of monthly gross income in dollars. It states percentages, but they relate to the base month of March 2002, not an increase "over the months." The MTR does not state the purpose of these percentages.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner errs in the claim that gross income, as reflected in the 2002 Schedule, may justify the ability to pay the proffered wage. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

Moreover, the unaudited 2002 Schedule is of little evidentiary value because it is based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). No other evidence pertains to 2002.

In summary, the MTR makes no offer of proof to rehabilitate unfavorable adjusted gross income for 1996 and 1997, selected, unconvincing, bank balances from 1998, non-existent 1998 and 2001 federal tax returns, lack of data for wages paid to the beneficiary in 2001 or any year, and unpersuasive submissions in the 2002 Schedule.

The only other evidence with the MTR is SP's undated statement that:

Many of you have noticed the changes that have been taking place at SP Auto Service in the last year. We are happy to inform you that many of you have been serviced by the professional technician Mr. Luis Fernando Cevallos, who has been performing the day-to-day operations of SP Auto Service.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. SP's undated statement provides no standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

After a review of the federal tax returns, lease, insurance policy, petitioner's affidavit and business plan, bank statements, and briefs, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

An additional issue concerns the normal measure of the sole proprietor's ability to pay the proffered wage, namely, amounts of adjusted gross income as reported on the petitioner's Form 1040. These proceedings reflect no determination of household living expenses of the petitioner and, thus, no balance, if any, available for the sole proprietor to pay the proffered wage. Federal tax returns for 1999 and 2000 reported adjusted gross income equal to, or greater than the proffered wage. Though not a basis of this decision, the lack of evidence of the petitioner's expenses, to be set off against adjusted gross income, prevents the approval of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.